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CHARLES ELMORE C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1931.

HARRY BLOCKBURGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

374

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WITH SUPPORTING BRIEF.

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MOTION FOR WRIT OF CERTIORARI.

Comes now Harry Blockburger, by Harold J. Bandy, his counsel, and moves this Honorable Court that it shall, by certiorari or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Circuit Court of Appeals, lately pending, wherein petitioner, Harry Blockburger, was appellant, and respondent, United States of America, was appellee, and to that end he tenders herewith, his petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

HAROLD J. BANDY,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry Blockburger, respectfully represents that he was convicted on counts two, three and five of an indictment in which he was charged with various violations of the Harrison Narcotic Law. Counts two and five involved the same transaction, the unlawful sale of ten grains of morphine to one Ella Rush, the only difference between them being that count two charged that the morphine sold was not in nor from the original stamped package, and count five charged that the sale was not made in pursuance of a written order of Ella Rush and upon a form issued in blank for that purpose by the Commissioner of Internal Revenue.

Upon each of these counts your petitioner received the maximum punishment provided by law. The Court sentenced him to serve a term of five years in the United States penitentiary at Leavenworth, Kansas, upon each of counts two, three and five, to pay a fine of $2,000.00 on each count, and stipulated that the sentences should run consecutively; that imprisonment under count three should follow that under count two and imprisonment under count five should follow that under count three.

Immediately after sentence petitioner presented to the Court his motion to vacate or modify the judgment because (1) the sentence imposed was unreasonable and excessive, and (2) the sentence should not exceed five years in the penitentiary and a fine of $2,000, that being the maximum provided by law, and (3) the sentence imposed was in excess of that provided by law. The Court denied this motion, but allowed petitioner an exception. He appealed to the United States Circuit Court of Appeals for the Seventh Circuit. As one of his assignments of error he alleged that: "The Court erred in imposing an excessive and unreasonable punishment."

The Circuit Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court, but Justice Alschuler filed a dissenting opinion.

Your petitioner respectfully represents that the writ of certiorari should be allowed in this case for the following reasons:

I.

The opinion in this case, concurred in by the majority of the members of the Court of Appeals for the Seventh Circuit, conflicts with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in Ballerini v. Aderhalt, Warden, 44 Fed. (2nd) 352, in which case that Court reached the conclusion that two penalties may not be predicated on a single sale of narcotics. Circuit Judge Alschuler, in his dissenting opinion in petitioner's case, said that:

> "It is to be hoped that this conflict in decisions of the United States Courts of Appeals for the Fifth and Seventh Circuits may be authoritatively resolved."

II.

A confusion now existing in the law will be clarified through the action of this Honorable Court in construing the penal section of the Harrison Narcotic Law, and deciding whether two punishments, each for the maximum fixed by law, may be based on one unlawful sale of narcotics.

III.

The essence of the offense charged in counts two and five was the unlawful sale of ten grains of morphine. The fact that the sale was not from the original stamped package, and also that it was not made in pursuance of a writ-

ten order of Ella Rush and upon a form issued in blank for that purpose by the Commissioner of Internal Revenue, did not justify the imposition of double punishment for the same transaction. The penal section of the Harrison Narcotic Act (Section 705, Title 26, U. S. C.) provides that "any person who violates or fails to comply with **ANY** of the requirements of sections 211 and 691 to 707 of this title shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years or both, in the discretion of the Court." The plain meaning of this language is that if, BY ONE ACT, such as an unlawful sale, a person violates any OR ALL of the requirements of the act, he shall be subjected only to one punishment.

IV.

The crimes charged in counts two, three and five, on which petitioner was convicted, describe a single continuing transaction. They involve one crime, and petitioner should not have received a sentence exceeding five years in the penitentiary and the payment of a fine of $2,000. This contention is supported by the record, and explained in the following summary of the facts in this case.

The sales of morphine charged in the various counts of the indictment were all made to the same person, and there was no appreciable interval of time between them. This case differs materially from the facts in United States v. Daugherty, 269 U. S. 360, in which each count charged a different sale to a different person and on a different

day, and in which it was held that each sale constituted a separate offense.

Your petitioner was indicted in the United States District Court for the Southern District of Illinois. He was indicted jointly with Margaret Walker, who was acquitted by the jury.

The first count charged that, on May 27, 1929, in the City of Springfield, Illinois, petitioner and Margaret Walker sold two grains of morphine hydrochloride to one Ella Rush, and that same was not then and there in and from the original stamped package.

The second count charged that, on May 28, 1929, in the City of Springfield, Illinois, petitioner and Margaret Walker violated the Harrison Narcotic Act by selling ten grains of morphine hydrochloride to Ella Rush, same not then and there being in and from the original stamped package.

The third count charged petitioner and Margaret Walker with the unlawful sale to Ella Rush of eight grains of morphine hydrochloride on May 29, 1929, from an unstamped package.

The fourth count charged petitioner and Margaret Walker with violating the Narcotic Drugs Import and Export Act approved February 9, 1929, by knowingly, unlawfully, etc., selling and facilitating the transportation, concealment and selling of twenty grains of morphine hydrochloride which had been fraudulently imported into the United States contrary to law. Petitioner was ac-

quitted upon this count. No count remains that charges a violation of this statute.

The fifth count charged that, on May 29, 1929, in the City of Springfield, Illinois, petitioner and Margaret Walker violated the Harrison Narcotic Act by knowingly, unlawfully, fraudulently and feloniously selling, bartering, exchanging and giving away, to Ella Rush, ten grains of morphine hydrochloride, not in pursuance of a written order issued to the said Ella Rush upon a form for that purpose by the Commissioner of Internal Revenue.

Counts one, two, three and five involved three alleged sales of morphine to Ella Rush. Upon count one, which charged the sale of two grains of morphine on May 27, 1929, petitioner was found not guilty. This leaves in the case only two alleged sales to her.

Ella Rush, an admitted drug addict, was the Government's principal witness. She testified she had been employed by a federal narcotic agent to entrap persons who were selling narcotics; that she went to Springfield with Narcotic Agent Bernard Peterson, called at the home of Margaret Walker, a known addict, and introduced herself, using an assumed name; told Mrs. Walker she was employed by a carnival, and that she needed morphine. She testified further that Mrs. Walker told her she did not handle morphine, but that she would see what could be done; that at 11 o'clock that night Mrs. Walker took her to a street corner in Springfield and introduced her to petitioner.

Ella Rush testified that she misrepresented her identity to petitioner when she met him; that she told him she needed and wanted morphine; that he replied that he did not know whether he could get her any that night; that she told him she did not have any and gave him $2.00; that he went away and she and Mrs. Walker entered a restaurant and waited; that he returned in a very few minutes, escorted her from the restaurant to a nearby doorway, and handed her a package of morphine which was wrapped in paper; that she then told him she needed more morphine and gave him $8.00; that about 2 o'clock the following morning petitioner went to her hotel room and delivered about ten grains of morphine to her; that about 11:30 of the same morning he again visited her room, at which time she gave him $10.00 more and requested him to procure $10.00 worth of morphine for her; that about 2 p. m. on the following afternoon he telephoned her and directed her to meet him at the same restaurant; that she went to the restaurant and waited for him, and Narcotic Agent Peterson seated himself at a table in the restaurant to observe the proceedings; that petitioner entered, seated himself beside her, and handed her a package of morphine.

This constitutes the entire transaction upon which the three counts are based.

Ella Rush testified that she was paid $3.00 a day by Narcotic Agent Peterson. She said that, upon arriving in Springfield, she was directed by Narcotic Agent

Howard, whom she met there, to visit certain persons, with whose names and addresses he supplied her, and attempt to purchase morphine, and that, acting upon this instruction, she introduced herself to Mrs. Walker and gave her $10.00 as an inducement for Mrs. Walker to introduce her to some one from whom she could purchase narcotic drugs.

Your petitioner respectfully represents that the facts shown here are decidedly different from those in the Daugherty case, supra, where the sales were to different persons and separated by intervals of several days. The transactions between petitioner and Ella Rush, as described by her, show a continuous transaction, induced by her, with her supplying petitioner with the Government's money and using each delivery of the drug as a leverage to persuade him to procure more of it for her. But in spite of the fact that this evidence disclosed one continuing transaction, involving, in the counts on which petitioner was found guilty, only two deliveries of drugs to the Rush woman, the Court treated this as constituting three separate crimes and committed petitioner to a total of fifteen years in the penitentiary, where he is now serving.

In his motion for a new trial, and in his assignment of errors, which was presented to the Court of Appeals, petitioner complained of errors committed at the trial, which prejudiced him with the jury and deprived him of a fair trial.

The record shows that, in cross-examination, petitioner

was asked if he was personally acquainted with Henry Walker, with John Smith, known as "Cookie" Smith, with Edward Lewis, sometimes known as Clarke, and with Lloyd Hemstrett and "Speck" Mahoney. Petitioner's objections to these questions were overruled and he was allowed an exception. He was then asked this question: "Now, I will ask you if these men, Henry Walker, John Smith, alias "Cookie" Smith, Edward Lewis, alias Clarke, John Mahoney and Lloyd Hemstrett, are not all known to you to be morphine addicts?" His objection to this question was overruled and he again excepted.

Petitioner's brother, George Blockburger, was asked this question in cross-examination, "Are you on the bond of a man named Bapple, who is charged with the violation of the Narcotic Law in this court?" Petitioner's objection was overruled, and he was granted an exception. There is no proof in this record that a man named Bapple was under indictment in that court.

Petitioner objected to certain remarks of the District Attorney in his closing argument to the jury. Ella Rush testified that when she was introduced to petitioner she told him that she was employed by a carnival company that was at that time exhibiting in Springfield, and that she later introduced petitioner to Narcotic Agent Peterson and told him that Peterson was a pickpocket who followed the carnival and engaged in that business. In discussing petitioner to the jury, in the closing argument, the District Attorney said: "Here is a pickpocket, and he wasn't

shocked at that. That is the kind of people they associate with." Upon counsel for petitioner objecting, the Court said to the jury, "The jury will understand that this is Mr. Alexander's conclusion from the evidence."

In discussing Ella Rush, the District Attorney said in his closing argument: "I am an officer of the Government, and the Court is an officer of the Government, and we know Ella Rush." Petitioner objected to this statement, whereupon the Court said: "The jury is instructed to disregard the statement except that the Court has seen her here and has seen the circumstancs under which she comes here."

In another part of his closing argument the District Attorney said, "Most of these narcotic addicts are pickpockets, or a great many of them; we will admit that." The Court sustained petitioner's objection to this statement.

All the foregoing matters fully appear in the printed record.

Your petitioner respectfully submits that all of the grounds, reasons and matters asserted and appearing herein for the granting of this petition are duly authorized, raised, shown and presented by the bill of exceptions and assignment of errors, in due and proper way and place as appears by a certified copy of the record of the entire case and proceedings here present and pointed out in a supporting brief appended to and following this petition.

Petitioner respectfully represents that the United States Circuit Court of Appeals for the Seventh Judicial Circuit erred in deciding:

1. That the sentence imposed in this case did not constitute an excessive and unreasonable punishment.

2. That the sentence imposed in this case did not exceed the maximum provided by the Harrison Narcotic Law.

3. That the transactions in this case comprise three separate and distinct crimes.

4. That petitioner was not prejudiced through being asked, in cross-examination, if he did not know and associate with Henry Walker, with John Smith, known as "Cookie" Smith; with Edward Lewis, sometimes known as Clarke, and with Lloyd Hemstrett and "Speek" Mahoney, and if they were not all known to him to be morphine addicts.

5. That petitioner was not prejudiced by the District Attorney asking his witness, George Blockburger, this question: "Are you on the bond of a man named Bapple, who is charged with violation of the Narcotic Law, in this court?"

6. That petitioner was not prejudiced by the above-quoted remarks of the District Attorney in his closing argument.

7. That petitioner was not prejudiced by the following part of the Court's charge to the jury: "There was a rule at one time that one who had been convicted of a felony

was an incompetent witness. That is not the rule now, but he is a competent witness, and the jury has a right to take the fact of a former conviction into consideration in determining the degree of credibility they will accord to him as a witness, and, if you believe him, to act upon his testimony." It was prejudicial error for the Court to call attention to an extinct law or rule of evidence.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a certain day to be therein designated, a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the said case therein entitled Harry Blockburger, appellant, v. United States of America, appellee, to the end that the said case may be reviewed and determined by this Court, and that the said judgment of the said Circuit Court of Appeals and of the United States District Court for the Southern District of Illinois in this case, and every part thereof, may be reversed by this Honorable Court.

Your petitioner will every pray.

HARRY BLOCKBURGER,
Petitioner.

By HAROLD J. BANDY,
Attorney for Petitioner.

SUPPORTING BRIEF.

1.

The penalty section of the Harrison Narcotic Law does not contemplate double punishment for the same transaction. This section limits the punishment for one or more violations of the law which all result from the commission of one act to imprisonment in the penitentiary for not more than five years and the payment of a fine of not more than $2,000.00. This penalty section is as follows:

> "Any person who violates or fails to comply with any of the requirements of sections 211 and 691 to 707 of this title shall, on conviction, be fined not more than $2,000.00 or be imprisoned not more than five years, or both, in the discretion of the Court."

Section 705, Title 26 U. S. C.

2.

Two or more penalties, each equaling the maximum punishment provided by law, may not be predicated on a single unlawful sale of narcotics.

Ballerini v. Aderholt, Warden, 44 Fed. (2nd) 352.

3.

The sentence imposed in this case was cruel, excessive, unusual and not warranted by the facts shown in evidence.

In this respect it violated the spirit and language of the Eighth Amendment to the Constitution of the United States, which provides that:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Respectfully submitted,

HAROLD J. BANDY,
Counsel for Petitioner.